Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD BOYLE, Petitioner

v.

MICHAEL J. ASTRUE,
Commissioner of
Social Security, Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented, over which there is a split between District Court ruling, upheld by Ninth Circuit Court of Appeals, and rulings of this Court, are:

1) Whether the ruling of Court in *Bowen v. City of New York,* 476 U.S. 467 (1986) regarding equitable tolling is still valid, or is a decision by the Ninth Circuit citing *United States v. Sadler,* 480 F. 3d 932, 937 (9th Cir. 2007) now precedent.

2) Whether right to petition to Congress by petitioner, his wife and general counsel of the Writers Guild of America, as upheld by this Court in *United Mine Workers v. Illinois State Bar,* U.S. 353, 380 (US 1967), is still protected by First Amendment.

3) Whether the Fifth Amendment right to due process, non-adversarial Social Security Administration hearings as ruled by this Court in *Sims v. Apfel,* 530 U.S.103 (2000), is replaced by respondent's position that despite alleged misconduct and conflict of interest because of fees paid by opposing side, a claimant is still bound by the actions of his or her attorney.

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Boyle respectfully petitions for a writ of certiorari to review the orders of the District Court, upheld by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Ninth Circuit (App., *infra* 1-1a) are unreported. The District Court's denial of motion for reconsideration is unreported. (App. *infra* 2)

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit dismissed appeal from ruling of District Court on August 19, 2009 *(App.; infra 1,)* and dismissed petition for rehearing en banc and was entered on November 10, 2009 *infra. at 1a.* The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

STATIONARY PROVISIONS INVOLVED

Section 4(b) of the Social Security Reform Act of 1984, 98 Stat. 1800 provides:

> If Secretary does find a medically severe combination of impairments, the combined effect of impairments shall be considered throughout the determination process.

"The reform act is remedial legislation, enacted principally to be of assistance to large number of persons whose disability benefits have been terminated," *Bowen v. City of New York*, 476 (U.S. 1986.) Effective Sept. 25, 2003, Congress adopted 20 C.F.R. Pt 404:

404.1505 Basic definition of disability. (a) The law defines disability as inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted for a continuous period of not less than 12 months.

STATEMENT

Petitioner Richard Boyle, who is not an attorney, brought this action to correct alleged violations of the Social Security Act by respondent.

This case proceeding for 16 years through three administrative law judge hearings, remand from District Court, two denials by Appeals Council, appeal again to District Court, denial of motion for reconsideration, and two appeals to Ninth Circuit, petitioner argued is similar to Social Security cases ruled by Court in *Bowen v. City of New York, id.* and *Sims v. Apfel.*, 530 U.S. 103 (2000). Petitioner further argued that the respondent, Commissioner of Social Security, violated First Amendment right to petition by punishing his petition to Congress, joined by his wife and counsel, Writers Guild of America (WGA).

A. Statutory Framework

Under the Social Security Act to determine disability there is a sequential evaluation process, a series of five "steps." If a claimant is doing substantial gainful activity, he is not disabled. *(paragraph (b) 404.1520.* The second step is to consider medical severity of impairment, or combination of impairments. If the impairment or impairments meets the requirements *(paragraph (d)* then the Commissioner, respondent in instant case, will go on to step four. The Commissioner, usually through an administrative law judge (ALJ), will consider assessment of past relevant work, *404.1560 (b).* At the fifth and last "step" under *404.1565 (a)* the Commissioner will make a assessment of a claimant's past relevant work done within the last 15 years that was substantial activity and lasted long enough to learn the skills to do that activity.

Rule 202.17 in appendix 2, states, "However in some circumstances, we (Commissioner) consider that persons age 45-49 are more limited in their ability to adjust to other work than persons who have not attained age 45," and "If you (claimant) are approaching advanced age, (age 50-54), we will consider your age along with a severe impairment(s) and limited work experience may seriously effect your ability to adjust to other work."

In addition to Social Security Act, the Constitution provides for the First Amendment's right to petition and Fifth Amendment's right to due process.

B. Factual and Procedural Background

Petitioner, Richard Boyle, filed for Social Security disability benefits in Jan. 1993 under the provisions of the Social Security Act. After three denials by respondent, petitioner appealed in a November 23, 1998 administrative law judge (ALJ) hearing. Respondent denied benefits alleging petitioner did not have enough quarters of earnings paid into the Social Security system. Therefore respondent claimed the issue of medical disability was moot. Petitioner argued that he was in fact paid in a quarter that was incorrectly credited to another year. So there were then two issues before the ALJ in the 1998 hearing, did petitioner have enough earnings and if so, was disabled under the Social Security Act?

A medical and vocational expert testified and finding from a state consultative physician was recorded. At issue was petitioner at any time disabled from onset of disability in January 1993, through December 31, 1996 (the last date for disability insurance benefits) or December 31, 1997 (the date last insured for Medicare). Petitioner was then, under provisions of the Act, approaching advanced age at 54. It was ruled:

> "Plaintiff (petitioner) had the following 'severe' impairments; spondylosis and degenerative joint disease of the lumbar spine; anterior cruciate deficiency involving the left knee; osteoarthritis; asthma and hypertension."

The ALJ further ruled that petitioner did in fact earn the required quarters as a screenwriter and was precluded from returning to that profession based on testimony of vocational expert. The ALJ however ruled that petitioner had residual functional capacity (RFC) to do the job of "correspondence review clerk" and able to transfer to that occupation, therefore not disabled under the Act. The Appeals Council however overruled the ALJ ruling and issued its own decision on August 24, 2000 that petitioner, as a screenwriter, was employed by his agent, not production companies, so therefore was an independent contractor and not entitled to benefits.

Petitioner appealed to District Court for a review of decision in that "correspondence review clerk," job did not meet the definitions of the Act as a transferable skill for a person of advancing age, see *Boyle v. Massanari*, EDCV 00-00847 CW and case was remanded.

The Appeals Council in turn vacated its prior decision and remanded the case to another ALJ to make a new determination. On Dec. 5, 2005 that ALJ ruled that screenwriters were indeed independent contractors hired by their agents, not production companies. General Counsel of the Writers Guild of America (WGA) objected to that ruling as "erroneous" and his letter was forwarded as petition to Congress. ALJ in 2005 further ruled that petitioner had RFC for former profession of combat photojournalist because it was "sedentary' exertion. When petitioner's wife wrote to her congressman objecting to decision, the Appeals Council (respondent) construed petitioner's letter claiming violations of Social Security Act, joined by his wife's letters to Congress and WGA counsel's legal objections, not to be petition, but "implied request for review." On Feb. 10, 2006 respondent reversed or vacated all previous favorable or partially favorable ALJ rulings. Petitioner appealed again to District Court.

Petitioner's attorney filed a joint stipulation with respondent based on a single disputed issue, whether the Appeals Council violated rule of mandate by permitting the revisiting of certain issues in the disability hearing that had been decided favorably for petitioner.

On Feb. 6, 2007 District Court issued a decision and order affirming the decision of Commissioner, the respondent in instant case.

After his attorney quit the case without notifying his client, petitioner filed in *pro se* a motion for reconsideration in District Court. Since petitioner's attorney did not send file including the issues raised in the joint stipulation until after the ten day toll had passed to file such motion, respondent's attorney stipulated to equitable tolling and petitioner was allowed time to file motion past the deadline. That motion cited nine points of manifest error of fact or law under *Federal Rule Civ. P 60 (b) ...."court may relieve party...from a final judgment for the following reasons: Mistake, inadvertence, surprise, or excusable neglect;."* Petitioner further cited Fed. R. P 59 (e) to correct "manifest errors of law or fact."

District Court ruled that there is no constitutional right to effective assistance of counsel in Social Security proceedings despite citation that former attorney did not send case file on time for motion and acknowledging that respondent's attorney stipulated to an extension of time to file past ten day toll.

(1) On the First Amendment right to petition, District Court ruled "the evidence demonstrates that although these objections (letters from WGA counsel and petitioner's wife, as well as petitioner's letter to Congress alleging illegal conduct) were not directly addressed to the Appeals Council, plaintiff (petitioner) acquiesced in having them construed as written objections."

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(1) District Court however did not address allegation that payment of fees to his attorney by opposing side under the *Equal Access to Justice Act (EAJA), 28 U.S.C. 2401 (b)* violated due process by tainting that attorney's loyalties. In brief, petitioner cited his attorney not contesting at hearing the ALJ view that combat photojournalist was a "sedentary" job and not citing right to petition in joint stipulation and this was evidence of tainted loyalties and conflict of interest after being paid attorney fees by respondent, opposing side. Citing Federal Rules 59 (e) (a) and 60 (b) petitioner argued in motion for reconsideration to District Court that he could not be responsible for the actions of his former attorney in that he did not know of such actions because of not being informed of single legal issue raised in appeal, charging that attorney did not return phone calls or emails. This petitioner argued was a violation of rules of California State Bar. District Court ruled against petitioner's claim of "mistake, inadvertence, surprise, or excusable neglect" because former attorney "filed the Joint Stipulation without plaintiff's (petitioner) knowledge or permission," and joint stipulation had "manifest legal error and serious errors of fact, and more importantly, misled this court (District Court) of nine key issues of fact."

District Court agreed with respondent's legal position that even if allegations of attorney misconduct were true, and that issue was disputed, petitioner was still bound by "actions of attorney" and could not seek relief from "free calculated (and) deliberate choices." Petitioner argued he could not make "deliberate" choices on legal strategy because he did not know of that strategy, but District Court ruled Rule 60 (b) cannot be used to "assert new legal theories (such as constitutional claims of violation of right to petition) simply because the legal theories that actually were asserted have been rejected." District Court rejected petitioner's argument that he and his former attorney were not "acting as one," but ruled former attorney "raised complex and interesting challenges."

On April 22, 2009 petitioner filed appeal of District Court Nov. 23, 2008 Order to the United States Court of Appeals for the Ninth Circuit. Since respondent's counsel stipulated to waving the toll for previous motion for reconsideration and did not oppose oral arguments on Right to Petition before District Court, petitioner assumed opposing attorney would not object to equitable tolling as ruled in *Bowen v. New York, id.* However a new attorney was then appointed for respondent.

On April 19, 2009 the Ninth Circuit dismissed that appeal, citing *United States v. Sadler*, F 3d 932, 937 (9th Cir. 2007), and dismissed for lack of jurisdiction. Since the Ninth Circuit did not address the constitutional issues of right to petition and due process or previous rulings of Court in *Sims v. Apfel, id.* and *United Mine Workers v. Ill. State Bar* U.S. 353, 380 (1987), petitioner filed petition for rehearing en banc on Sept. 3, 2009, citing *Bowen v. New York, id.*

On Nov. 10, 2009 three judges of the Ninth Circuit "construed as a motion for reconsideration en banc of this court Aug. 19, 2009 order dismissing this appeal for lack of jurisdiction. So construed, the motion for reconsideration en banc is denied on behalf of this court." Petitioner is now appealing to this Court on the Constitutional issues of right to petition and due process and upholding previous rulings of equitable tolling in *Bowen v. N.Y.* and *Sims v. Apfel, id.*, of non-adversarial Social Security disability hearings.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of Federal Social Security law on which the rulings of District Court and Ninth Circuit are avowedly and intractably in conflict with rulings by this Court, in *Bowen v. N.Y.* id. and *Sims v. Apfel, id.*

While petitioner agreed with District Court ruling that in Social Security hearings claimants have no constitutional right to effective assistance of counsel, appeal cited ruling in *Sims v. Apfel , id.* that proceedings should be non adversarial and the respondent must develop arguments for and against granting benefits, majority opinion as delivered by Justice Thomas. However when an administrative law judge makes rulings such as the job of combat photojournalist is sedentary exertion and that screenwriters are hired by their agents, not producers, it was argued that these "erroneous" views were "adversarial" against petitioner, and there was little attempt to develop arguments for and against granting benefits. Petitioner argued in motion for rehearing en banc before Ninth Circuit that there was a covert and allegedly illegal policy to deny benefits to many qualified claimants, similar to the case in *Bowen v. New York, id.*

Ninth Circuit did not address the petitioner's citing of Court precedent in *Sims v. Apfel, id.* but instead cited another case, *U.S. v. Sadler, id.*, which was argued in motion for en banc hearing that this demonstrated judicial error because that case had nothing to do with Social Security law but dealt with Phillip Martin Sadler who was found guilty of one count of conspiracy to transport illegal aliens.

The Sadler and instant case have only one common legal issue, misconduct by counsel. In Sadler case his new attorney discovered former attorney never sent notice of appeal, and in instant case, former attorney refused to send file in time for petitioner to file motion for reconsideration. Other than attorney misconduct, the "jurisdictional" issue is very different in this case. Petitioner instead cited *Kontrick v. Ryan*, 540 U.S. 443 (2004) as did the Ninth Circuit in denial of motion for rehearing en banc based on "jurisdiction." However petitioner and the Ninth Circuit apparently arrived at different conclusions about this Court's rejection of Kontrick's claim that tolling of Bankruptcy Rule 4004 is "jurisdictional" and that it trumps other considerations. (2)

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(2) Justice Ginsburg delivering the unanimous opinion of Court in *Kondrick v Ryan*, *id*, stated, "courts, including this one, it is true, have been less than meticulous in this regard; they have more than occasionally used the term 'jurisdiction' to describe emphatic time prescriptions in rules of court. 'Jurisdiction' the Court has aptly observed, 'is a word of many, too many, meanings,'" *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83,90 (1998). This was also same view expressed in brief by petitioner that was rejected by Ninth Circuit, however none of these cases dealt with Social Security disability proceedings. Petitioner in appeal to Ninth Circuit cited other reasons for missing the toll including newly discovered evidence, such as the letter from Associate Commissioner to Congress and the fact the District Court Order denying motion for reconsideration had not been file stamped as required.

In petitioner's motion, it was noted that Ninth Circuit did not address Court's ruling in *Bowen v. City of New York, id.*, which is very similar to instant case, a class action against Commissioner of Social Security seeking relief on behalf of individuals residing in New York. They had been denied disability benefits because of allegedly illegal internal policy, conspiracy to deny benefits in violation of the Social Security Act. The District Court certified the class as including claimants who had not complied with the 60 day requirement for seeking judicial review. Holding that this policy was illegal, District Court ordered the Commissioner of Social Security to reopen the decisions denying benefits and to re-determine eligibility. After Court of Appeals affirmed, Commissioner appealed and Court granted certiorari.

Court ruled 9-0 in *Bowen v. N.Y., id*, the 60 day requirement is "not jurisdictional but rather constitutes a statue of limitations. Equitable tolling of that requirement is consistent with Congress' intent in enacting 405(g)....Tolling serves the Act's purpose where the internal policy prevented the claimants from knowing of a violation of their rights."

Petitioner in Motion for review en banc to the Ninth Circuit cited similarities in *Bowen v. N.Y. id,* "since claimants could not attack a policy of which they were unaware, it would be unfair to penalize them for not exhausting under circumstances."

In fact, petitioner argued, the San Bernardino, California, Social Security hearing center had the second highest rate of denial of claims in the United States, with a 49.43 percent rejection rate. This was during the period in question, 2005-2008, However one administrative law judge at the San Bernardino center during same period had a near record of 82.48 percent rejection rate of all disability claims. (3) Petitioner did not learn of an alleged conspiracy by respondent to encourage administrative law judges to make such capricious or arbitrary decisions, such as combat photojournalists being a "sedentary" job in an effort to unjustly deny claims, until documents were later discovered, including (App. 3a). This was a letter from the Associate Commissioner of Social Security to Congress denying petition against alleged ALJ abuse of discretion to deny disability claim.

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(3) In instant case both sides, petitioner and respondent are in agreement on the basic facts of the case, such as the severity of medical impairments and the federal regulations and many case precedents such as *Reddick v. Chater* 157, F3d. 715, 720-21 (9th Cir. 1998) was there "relevant evidence which a reasonable person might accept as adequate to support a conclusion?" However there is disagreement about petitioner's argument of a covert internal policy by respondent's of rejecting all evidence that a reasonable person would accept to illegally deny disability benefits.

The key issue is a question of fact, were letters to Congress by wife of petitioner and the senior Writers Guild counsel and a letter from petitioner citing alleged illegal activity of respondent; direct appeals to the Appeal Council to assume jurisdiction of the case, and delay appeal to District Court for eleven months or were they actually constitutionally protected petitions? In one of those letters the WGA counsel objected to the ruling by both the ALJ and Appeals Council that screenwriters were independent contractors hired by their agents. The fact that Appeals Council, respondent, later retreated from that opinion demonstrates WGA counsel was correct that the ruling on this issue was indeed "erroneous." Petitioner's wife letter asked her congressman a question which a "reasonable person" might ask, is the job of combat photojournalist really "sedentary" exertion or was this decision something out of "Alice in Wonderland." Record shows that petitioner's wife stated as a student of political science she learned citizens have a right to appeal to their elected representatives to "correct injustice" and informed her congressman that her husband (petitioner) was about to appeal to Federal Court. Respondent alleged this was an "implied" request for review by Appeals Council, which then delayed and denied benefits, overturning past favorable ALJ rulings.

(4) Petitioner argued this was petition, protected by the First Amendment. District Court ruled it was not petition because it was "construed" as "implied" request for review by respondent. Petitioner argued this was not only legal error, but a violation of right to petition.

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(4) Petitioner waited to file appeal to Ninth Circuit until newly discovered evidence, a letter from the Associate Commissioner of Social Security to that congressman, (App. 4 a), not entered into record, was revealed. That letter and the letter from petitioner to Congress (App. 5 a) were presented as evidence letters were not "implied requests for review" to Appeals Council, but a call for congressional inquiry into violations of the Social Security Act by the respondent. Appeals Council delayed due process for nearly one year and then reversed or vacated all previous favorable or partially favorable ALJ rulings. District Court agreed with respondent "Appeals Council must honor the promise....to consider all these arguments" raised against the decision and (respondent) reasonably construed the August 2005 letter (App. 5 a) as written objections..." Petitioner cited falsification of the wording of his wife's letter, which asked the congressman to hold respondent to their commitment to honor the "promise to make a decision soon," and in no way assume jurisdiction, stating her husband was about to appeal to Federal Court, waiting for the time to expire to file. In appeals to the Ninth Circuit, petitioner raised the colorable constitutional issue that the respondent punished his petitions to Congress, joined by his wife and WGA counsel in violation of the First Amendment right to petition.

I. QUESTION PRESENTED OF LEGAL REPRESENTATION REPRESENTS A RECURRING ISSUE OF EXCEPTIONAL IMPORTANCE THAT THREATENS ENFORCEMENT OF THE SOCIAL SECURITY ACT.

The questions presented are recurring and of exceptional importance in that the vast majority of all claims for social security benefits are denied at the initial stage and sixty percent (5) of those cases that are appealed to Federal courts are either remanded or reversed. That the issue is recurring cannot be denied. (App. 6) On July 25, 2003 Commissioner of Social Security in Congressional hearings asked the same question as does petitioner, "why does it take so long to make a disability decision," and "why can't people who are obviously disabled get a decision immediately?'

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(5) In letters to Congress and that Commissioner this was the same position of petitioner, who asked how could a "reasonable person" accept an ALJ ruling that the job of combat photojournalist was "sedentary" exertion and that screenwriters were hired by the agents and therefore not qualified for benefits? Petitioner agreed with then Commissioner in brief before District Court, seeking elimination of the Appeals Council and replacing it with Federal Reviewing Officials since Appeals Council was in effect a "rubber stamp" the questionable 60 percent of ALJ decisions that were later reversed or remanded by Federal courts. It was the position of petitioner in brief to Federal Court that these Federal Court reversals and remands not only wasted millions in tax funds and court time, they contributed to the internal illegal policy of a conspiracy to deny benefits to qualified claimants, as ruled by Court in *Bowen v. N.Y., id.* and practiced in the San Bernardino hearing center.

The end result of this policy is that hundreds of thousands of qualified social security disability claimants, often without effective legal counsel, are denied benefits in an internal policy called by some Congressional witnesses a policy of, "delay, deny and hope you die."

(6) An example of a questionable ALJ ruling in instant case was the exclusion of all evidence of petitioner's advanced glaucoma in both eyes, nearly total in right eye, as presented by two treating eye surgeons. The ALJ in 2005 hearing rejected this evidence, including vision field tests as well as all the findings of the consultative state doctor as "having little weight" and the medical expert testimony at the 1998 ALJ hearing as being "overly generous." Petitioner's attorney, who had been paid attorney fees by opposing side, did not object in the hearing to the ALJ's rejecting of all proven medical evidence of advanced glaucoma. The ability to see clearly is a prime job requirement for a combat photojournalist; however, as petitioner questioned in brief, if an ALJ can make a "capricious or arbitrary" ruling that combat photojournalist is a "sedentary" job, then it would not matter if a war photographer could see or not.

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(6) Transcript of 2005 hearing shows that when ALJ stated "with physical condition, so that document will not be admitted into evidence." Petitioner's attorney said of ALJ rejecting evidence of glaucoma: "That's fine." The ALJ also asked the vocational expert about exertion level of (combat) photographer, "so the residual functional capacity I gave you is closer to sedentary, correct?" Again attorney did not object.

The petitioner also asked in motion for reconsideration to District Court if conduct of his former attorney such as not objecting to exclusion of medical evidence of glaucoma in hearing did not show cause for conflict of interest, saying in brief, "he who pays the piper calls the tune?" District Court ruled former attorney's actions were not misconduct under the rules of the California State Bar.

Petitioner agreed with the position of attorney for respondent that in many cases the costs of contesting a government order, as in instant case, exceeds the amount at stake. However petitioner believes that instead of the Congressional intent "to throw the Social Security claimant a lifeline," see *Shalala v. Schaefer*, 509 U.S. 292, 309, 113 S.Ct. 2625, 125 L. 2d 239 (1993) the reality in many cases is the loyalty of an attorney (paid by opposing side) goes to the one who "pays the piper," not his or her client. The effect is to throw a drowning Social Security disability claimant an anchor instead of a lifeline as demonstrated when an attorney refused to object to questionable ALJ decisions, such as that combat photojournalist is a sedentary job or to disallow medical evidence of glaucoma. While petitioner does agree with respondent that the intent of Congress in the EAJA was serve to justice by paying opposing attorneys' fees, usually $125 per hour, in practice it has had an opposite effect to deny justice.

II. THE DECISION OF DISTRICT COURT, UPHELD BY THE NINTH CIRCUIT, CAN NOT BE RECONCILED WITH PREVIOUS RULINGS OF THE NINTH CIRCUIT AND U.S. SUPREME COURT.

In motions to District Court and Ninth Circuit, petitioner cited several rulings by Ninth Circuit in similar Social Security disability cases. In the 2005 hearing, the administrative law judge (ALJ) rejected petitioner's testimony about residual pain from being wounded twice as a combat photographer in Vietnam and from being a prisoner of war of Cambodia's Khmer Rouge in 1975.

However petitioner argued rejecting testimony of pain from spinal fracture, as well as discounting findings by state consultative doctor and medical expert testimony at 1998 ALJ hearing was a direct violation of Ninth Circuit ruling in *Remminger v. Commissioner of Social Security*, 98-35004 (9th Cir. 1999) which stated that the ALJ's reasons for rejecting testimony of claimant and treating physician were not supported by substantial evidence and ordered payment of benefits. In this case the ALJ in 2005 hearing rejected the testimony of petitioner as "lacking creditability" and discounted state consultative medical report and testimony of medical witness, substituting his own medical opinion.

Rejecting medical evidence and testimony also was in direct conflict with *Smolen v. Chater*, 80 F 3d 1273, 1297 (9th Cir. 1996) and *Swensen v. Sullivan*, 876 F 2d 683, 689 (9th Cir. 1989) requiring that ALJ specify any factors discrediting a claimant at first opportunity to discourage them from reaching a conclusion and then attempting to justify it by ignoring competent evidence, such as findings and reports of two treating eye surgeons of petitioner's advanced glaucoma. (7)

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(7) In December 2005 decision ALJ also ruled that petitioner did not have asthma, discounting findings of asthma by state consultative doctor and testimony of medical expert, as well as all treating doctors. This is in direct conflict with *Bunnell v. Sullivan* 947 F 2d. 341, 345 (9th Cir. 1999) and *Byrnes v. Shalala* 93-17805 (9th Cir. 1991) that precludes an ALJ from substituting his own medical opinion over treating or consultative doctors, see *Light v. SSA* 119 3d, 789, 792 (9th Cir. 1997). Even respondent, Appeals Council, found the 2005 ALJ decisions regarding impairments and alternative RFC finding to be "erroneous and unsupported by substantial evidence." However District Court ruled "the Appeals Council assumed jurisdiction and issued its own independent decision regarding plaintiff's (petitioner) functional capacity." This was based largely on the Dictionary of Occupational Titles (DOT) which describes the jobs of screenwriter, producer, college professor, and photographer, all former positions of petitioner. District Court cited *Pinto v. Massanari*, 249 F 3d, 840, 845 (9th Cir. 2001) as saying DOT is "best source for how a job is generally performed in national economy." Petitioner also cited same case, in which the Ninth Cir. further ruled, "this is not to say, however, that the ALJ is in any way relieved of his burden to make appropriate findings to insure the claimant can perform his or her relevant work."

In motions petitioner argued that DOT descriptions of the job of screenwriter, selecting a subject based on "theme or interest," was simplistic and not accurate and that the job of producer was not really a job, but a management position requiring wealth or the ability to raise large amounts of money. (8) While intimidating to claimants, the five steps also become impossible hurdles if an ALJ does not follow the ruling of 9th Cir. in *Pinto v. Massanari, id,* or Court's ruling in *Sims v. Apfel, id.* Often a claimant has a better understanding of the exertion levels of his or her former job than does the ALJ or even vocational expert using the DOT, with often inaccurate or vague job descriptions. In website, respondent reports that the DOT has not been updated since 1991 and petitioner argued in briefs that the DOT is not only outdated, but is so filled with errors of fact that it denies justice by distorting claimants' real levels of exertion for a given job. For example DOT may be inaccurate in describing "light" exertion level of many college professor positions, such as teaching documentary film photography.

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(8) Under the Social Security Act the respondent has the obligation at step five to prove a claimant has residual function to return to a job he or she did in the past 15 years. However in practice, as *Sims v. Apfel, id.*, demonstrates, if an ALJ can make selective use of the record, pose defective questions to the vocational expert and refuse to order consultative examination, or as in instant case, discount the consultative examination as having "little weight" and substituting the ALJ's own medical opinion over that of state doctors, then the entire process must be questioned.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR DECIDING QUESTIONS PRESENTED.

A. There Are No Impediments to Court Granting Petitioner the Relief Sought, and the split between District Court and Circuit Court Rulings and Precedent Rulings of Ninth and other Circuits and this Court makes this issue now Mature and Ripe for review.

This case presents an appropriate vehicle to resolve the *colorable* constitutional claims of right to petition and due process. After his attorney quit without notification, petitioner, who could not afford counsel, proceeded *pro se* in filing motion for reconsideration in District Court. Petitioner, as stated in District Court oral arguments, praised opposing counsels as having a better respect for justice than former attorney by not opposing equitable tolling after former attorney refused to provide case file in time for motion. Petitioner informed opposing counsel within 60 days of District Court order that he planned to file to the Ninth Circuit and cert to this Court if that appeal was denied. Petitioner assumed that respondent's counsel would not object to Ninth Circuit review of the Constitutional claims. However another counsel was then appointed for respondent.

Docket of *Boyle v. Astrue* 09-55617 (Ninth Cir. 2010) shows that petitioner's opening brief was due 06/03/2009 and respondent (apellee) answering brief was due 07/03/2009. On 05/04/2009 Ninth Circuit received original and 7 copies of petitioner's opening brief, however that same day respondent substituted attorneys. While there is no record of new attorney of record filing an answer to the constitutional claim of violations of right to petition and due process, three judges of the Ninth Circuit dismissed appeal for en banc review for lack of jurisdiction on 08/19/2009. (9) Petitioner, citing newly discovered evidence, letter from Associate Commissioner to Congress, as well as the ruling of Court in *Bowen v. City of New York, id.*, sought en banc review, entered on 09/03/09.

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(9) Petitioner argued that since the decision of three Ninth Circuit judges had more to do with politics than precedent decisions, such as ruled by this Court in *Bowen v. New York, id,* on equitable tolling, this ruling threatened the constitutional doctrine of separation of powers between the three branches of government, so therefore should be considered en banc. However the issues of right to petition, due process and separation of powers were never addressed en banc because that petition was "construed as a motion for reconsideration" and the motion was again dismissed for "lack of jurisdiction." Petitioner argued in motion for en banc hearing that Ninth Circuit erred by applying *U.S. v. Sadler,* id and rejecting more relevant Court decisions such as *Bowen* and *Sims.*

B. This case is also vehicle to resolve conflict in interpretation of the First Amendment, Right to Petition and Fifth Amendment, Due Process.

Petitioner acknowledges that Court will review only a very small percentage of writs of certiorari, and does not favor *pro se* certs, however if District Court order stands, to construe petitions, including those from wife of petitioner and WGA counsel, to be implied consent for respondent to assume jurisdiction, and then delay and deny due process, not only would "sacred" rights be in jeopardy, but the doctrine of separation of powers, with checks and balances, would also be in danger. Basic to our Constitution is the concept that a party may appeal a decision from one government agency, in instant case; respondent, Commissioner of Social Security, to another; Congress, which makes the laws that govern that agency. (10)

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(10) In fact, Congress on many occasions did hold hearings, such as on September 25, 2003 (App. 6) when the Ways and Means Committee heard testimony of allegations of fraud, waste and abuse by respondent, such as SSA offices in Chicago and Milwaukee throwing case files into recycle bin or employees, some private contractors, taking files home. Petitioner in instant case argued in motions that respondent "lost" many medical records and the administrative law judge made "arbitrary and capricious" decisions.

Commissioner testified at 9/25/03 (App. 6) Congressional hearing, "Federal Courts remand 60 percent of cases that passed through the Appeals Council," and "claimants must pay a high price for relief," similar to this case in which District Court remanded for another hearing, and respondent then made "arbitrary" decisions to delay and deny claims. The President of the Association of Adiministrative Law Judges also addressed 9/25/03 hearing, (pg. 62) saying, "there has been a long history of conflict from SSA management intrusion of its (ALJ) policy function," and further testified of an "untenable atmosphere of tension and unfairness which violated the spirit of the APA (Administrative Procedure Act)." Testifying that the agency used "injudicious" use of phrases such as "targeting" and "goals" to pressure ALJs to illegally invalidate legitimate claims for Social Security disability benefits, that witness demonstrated same illegal tactics challenged by Court in *Bowen v. N.Y. id,* and alleged in instant case. Congress in fact adopted the APA in 1946 to ensure that "the American people were provided hearing that were not prejudiced by undue agency influence." Court further ruled on this issue in *Butz v. Economou,* 428 U.S. 476, 513-514 (1978) ruling, "Since the securing of fair and competent hearing personnel was viewed as 'the heart of formal administrative adjudication.'" Also at that 9/25/03 congressional hearing elected representatives of SSA employee unions testified of low morale of dedicated staff because their calls for reform were ignored and Commissioner refused to meet with them.

If securing a fair and competent hearing is at the "heart" of our system of justice, and the APA law mandates that an ALJ can not be at once be judge, jury and prosecutor, or be unduly influenced to make illegal decisions under pressure as was demonstrated in *Bowen v. N.Y. id,* then the actions of the San Bernardino, California, hearing center could be questioned since the rate of denials of disability claims was much greater than other centers, showing a wide discrepancy in decisions.

Using the Reddick test, would any reasonable person support actions of ALJ in instant case such as denial of all relevant medical evidence; discounting testimony of medical expert, or questionable vocational views such as ruling the job of combat photojournalist as being sedentary exertion, and even not allowing a claimant's wife to testify? Congress did take action, as did this Court in *Bowen v. N.Y.* and *Sims v. Apfel, id.* Congress enacted the Reform Act after hearing testimony in the 2003 hearing that Social Security Agency's practices were "devastating to claimants and their families," and "it also damages public perception of the SSA." (App. 6) However, as petitioner argued in briefs to Federal Court, respondent ignored not only the intent and legislative action of Congress, but also the intent of this Court in the *Sims* and *Bowen* rulings.

5. U.S.C. 7703 (c) (2000) bars an ALJ from making rulings that are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," however an investigation by Inspector General of Unfair Treatment Complaints, (App. 6) (claimants alleging unfair treatment by administrative law judges or Appeals Council violations of this law), were "lost" or not properly filed. Therefore respondent really does not know how widespread is the practice of a hearing center, such as in San Bernardino, California, conducting alleged internal illegal policy of rejecting the majority of legitimate claims to assure "targeting goals" were met to unjustly deny benefits.

Petitioner does agree that most employees of the Social Security Administration (SSA) try to follow rule of the Social Security Act, but also agrees with testimony by member of Social Security Advisory Board (App. 6) at 2003 Congressional hearing that, "SSA has a strong institutional resistance to open discussion of the agency problems." These problems are difficult to correct because "it requires a fundamental change in Agency culture," as members of Congress heard in testimony, and despite Congressional hearings and passage of laws such as Reform Act, this policy continues unabated. As previously ruled in *Bowen* and *Sims* decisions, this honorable Court may be the last resort available to address requirement for respondent to adhere to Social Security Act as written by Congress.

True, this Court has not the power to actually enforce law, in this case the Social Security Act, but as in past decisions it has sent a clear message of intent to compel government agencies, such as respondent, Commissioner of Social Security, to adhere to the law and the Constitution.

Therefore to allow respondent to construe petitions to Congress by petitioner, his wife and WGA counsel as implied consent to assume jurisdiction of a case, would take away a basic redress of grievances, "to correct injustice" guaranteed by the time honored doctrine of separation of powers, the right to petition one branch of government over alleged illegal acts by another. It would also trust a proverbial spear into the very "heart" of mandated judicial procedure as written into the APA by Congress and upheld by this Court. Most important, it would also challenge the Constitution; the "sacred precious right" to petition as defined in First Amendment.

Clearly this case presents issues, that absent this Court's intervention, would cause injury to not only legal rights under Social Security Act of petitioner and other legitimate claimants for disability benefits, but signal a drastic judicial alteration of the Constitution's sacred and cherished principles of due process and right to petition.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD BOYLE
Pro Se
40966 Pine Dr.
Forest Falls, CA 92339
Tel: 909-794-7813

February 8, 2010

CERTIFICATE OF COMPLIANCE

No. 09-55617

RICHARD BOYLE
Petitioner

V.

MICHAEL J. ASTRUE,
Commissioner of Social
Security,
Respondent

As required by Supreme Court Rule 33.1 (h), I certify that the petition for a write of certiorari contains 7059 words, excluding parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb. 8, 2010

Richard Boyle

FILED
NOV 10 2009

No. 07-55617

In The
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD BOYLE, Plaintiff - Appellant,

v.

MICHAEL J. ASTRUE,
Commissioner of
Social Security, Defendant - Appellee

ORDER

Before: SCHROEDER, KLEINFELD and M. SMITH, Circuit Judges.

Appellant's petition for rehearing en banc is construed as a motion for reconsideration en banc of this court's August 19, 2009 order dismissing this appeal for lack of jurisdiction. So construed, the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. Gen. Ord. 6.11; *see also Bowles v. Russell*, 551 U.S. 205 (2007) (court lacks authority to create equitable exceptions to jurisdictional requirement of timely notice of appeal); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (applying *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam) and *Kontrick v. Ryan*, 540 U.S. 443 (2004), and concluding that statutory time limits are mandatory and jurisdictional).

No further filings shall be accepted in this closed case.

FILED
AUG 19 2009

No. 07-55617

In The
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD BOYLE, Plaintiff - Appellant,

v.

MICHAEL J. ASTRUE,
Commissioner of
Social Security, Defendant - Appellee

ORDER

Before: SCHROEDER, KLEINFELD and M. SMITH, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the April 22, 29909 notice of appeal was not filed within 60 days from entry of the November 23, 2008 order. *See* 28 U.S.C. § 2107(b); *United States v. Sadler*, 480 F.3rd 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional). Consequently, this appeal is dismissed for lack of jurisdiction.

All pending motions are denied as moot.

No. EDCV 06-351 (CW)

In The
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

RICHARD D. BOYLE, Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner, Social Security
Administration, Defendant

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff Richard Boyle, proceeding pro se, has filed a motion for a reconsideration of this Court's decision, entered on February 6, 2007, affirming the Commissioner's decision to deny plaintiff disability benefits. For the reasons set forth below, this motion is denied.

I. PRIOR PROCEEDINGS

Plaintiff filed the instant action on March 31, 2006, appealing a decision by the Commissioner denying his application for disability insurance benefits ("DIB") and Medicare benefits under Titles II and XVIII of the Social Security Act. On January 18, 2007, the parties

filed their Joint Stipulation ("JS") identifying the matters not in dispute, issues in dispute, the positions of the parties, and the relief sought by each party. The single disputed issue was whether the Appeals Council violated the rule of mandate or other legal principles by permitting the revisiting of certain issues in the disability determination that had been decided favorably for plaintiff. On February 6, 2007, the Court issues a Decision and Order affirming the decision of the Commissioner. Judgment was entered in this action pursuant to the Decision on February 6, 2007.

On March 22, 2007, plaintiff filed the instant motion, seeking reconsideration pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. On July 3, 2008, plaintiff filed an unopposed request for oral argument. On September 18, 2008, the court granted the request for oral arguments. On October 6, 2008, plaintiff filed "Arguments for Right to Petition." On October 7, 2008, defendant filed an opposition to the motion for reconsideration. On October 15, 2008, plaintiff filed an answer to defendant's opposition. On October 16, 2008, plaintiff filed opening and closing statements. Oral arguments were heard on October 16, 2008. This matter is now ready for decision.

II. LEGAL STANDARD

Rule 60(b) provides, in pertinent part, that:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . ., (3) fraud . . ., misrepresentation, or other misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged . . . or applying it prospectively is no longer equitable; or (6) any other reason justifying relief.

Fed. R. Civ. P. 60(b).

III. DISCUSSION

Plaintiff seeks relief under Rule 60(b) (1): "mistake, inadvertence, surprise, or excusable neglect." [Plaintiff's Motion For Reconsideration ("Motion") at p. 2] Specifically, plaintiff contends that he is entitled to relief because his attorney filed the Joint Stipulation "without Plaintiff's knowledge or permission, had manifest legal error and serious errors of fact, and, more importantly, misled this court on nine key issues or facts." [Id.]

A. Mistake, Inadvertence, Surprise or Excusable Neglect

To qualify for equitable relief under Rule 60(b)(1), the moving party must demonstrate "mistake, inadvertence, surprise or excusable neglect." Engleson v. Burlington Northern R. Co., 972 F.2nd 1038, 1043(9th Cir. 1992). However, this provision of Rule 60(b) "does not relieve parties from strategic mistakes," and an attorney's unsuccessful litigation strategy does not constitute a "mistake" or "excusable neglect" within the meaning of the rule. Tareco Properties, Inc. v. Morriss, 321 F.3d 545, 549 (6th Cir. 2003) (citing Federal's Inc. v. Edmonton Inv. Co., 555 F.2d 577, 583 (6th Cir. 1977) reliance on an unsuccessful legal theory is considered an affirmative tactical decision for which relief under Rule 60(b) will not be granted.)); Chung v. Smith, 778 F.2d 83, 86 (1st Cir. 1985) (plaintiff cannot use a Rule 60(b) motion to assert new legal theories simply because the legal theories that actually were asserted have been rejected). Rule 60(b) does not provide relief from "free, calculated [and] deliberate choices." Ackerman v. United States, 340 U.S. 198, 71 S. Ct. 209, 95 L. Ed 207 (1950); Plotkin v. Pacific Telephone and Telegraph Co., 688 F.2d 1291, 1293 (9th Cir. 1982).

Applying the principles above, nothing in the record indicates

that the decision by plaintiff's counsel to present, in the Joint Stipulation, the issue of whether the rule of mandate was violated was mistaken or inadvertent; rather, it appears that counsel made conscious decisions, with which plaintiff now disagrees. This type of error, if error it was, does not constitute a basis for relief under Rule 60(b) (1). Where counsel makes a deliberate choice to rely on one legal theory, the party cannot thereafter attempt to be relieved of the consequences of that conscious decision should the theory prove to be unsuccessful. Federal's, 555 F.2d at 583. Moreover, contrary to plaintiff's negative characterization of counsel's performance, counsel's strategic decisions in challenging the Commissioner's denial of benefits raised complex and interesting legal issues to which the court gave serious consideration. Under these circumstances, plaintiff's motion for reconsideration under Rule 60(b) (1) must be denied.[1]

B. Plaintiff's Claims Lack Merit

Even assuming that reconsideration under Rule 60(b)(1) were available, none of the claims raised by plaintiff in his motion for reconsideration would merit relief. Plaintiff raises the following

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[1]Defendant points out that plaintiff's motion appears to seek relief, alternatively, under Fed. R. Civ. P. 59(e), which permits a party to file a motion for a new trial or alter or amend a judgment. (1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening change in controlling law. Turner v. Burlington Northern Santa Fe R. Co., 338 F.3d 1038, 1063 (9th Cir. 2003). To the extent that plaintiff appears to be raising a claim under ground (1), relief is unavailable where, as here, the moving party is simply attempting to raise new legal theories for the first time. Havoco of America Ltd. v. Sumitomo Corp. of America, 971 F.2d 1332, 1336 (7th Cir. 1992); Akers v. United States, 2003 WL 23574234 at *2 (D. Or. 2003).

nine claims.

First, plaintiff contends that his hearing testimony in September 1998 regarding the physical demands of his past relevant work was falsified: contrary to the Commissioner's finding, his work as a screenwriter did not involve just sitting in front of a computer, but required his presence in physically challenging locations, such as El Salvador. [Motion at p. 2-3.] However, the Commissioner did not dispute plaintiff's testimony that he could not perform his past relevant work as he actually performed it; instead, the Commissioner found that he could perform that work as it is generally performed in the national economy, which is all that is required under Step Four of the sequential evaluation. [AR 236-37.] See Pinto v. Massanari, 249 F.3d 840, 845 (9th Cir. 2001).

Second, plaintiff contends that he was denied due process at his September 1998 hearing because he was not represented by counsel.[2] [Motion at p. 4-5.] However, the transcript of that hearing establishes that plaintiff made a knowing and intelligent waiver of representation by counsel and elected to proceed pro se. [AR 32.] See Vidal v. Harris, 637 F.2d 710, 714 (9th Cir. 1981). Moreover, plaintiff was represented by counsel at both of the two subsequent

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[2]To the extent that some of plaintiff's claims appear to raise due process allegations under the Fifth Amendment, the court has jurisdiction to review a colorable constitutional claim if it implicates either a meaningful opportunity to be heard or seeks reconsideration of an adverse benefits determination. Rolen v. Barnhart, 273 F.3d 1189, 1191 (9th Cir. 2001); Evans v. Chater, 110 F.3d 1480, 1483 (9th Cir. 1997) (discussing Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)). A claim is "colorable" if it is not "wholly insubstantial, immaterial or frivolous." Rolen, 273 F.3d at 1191 (citations omitted). Here, even assuming that plaintiff has raised a colorable constitutional claim, there was no due process violation with regard to either plaintiff's opportunity to be heard or his request for reconsideration of the Commissioner's adverse decision, as discussed below.

hearings (in September 2002 and May 2005) and at the time that the Commissioner issued the decision subject to the instant complaint. [AR252, 421, 430.]

Third, plaintiff contends that his attorney and the Commissioner misrepresented the date of the initial filing of is disability application as May 1997, where he actually first filed in January 1993; plaintiff also contends that medical records, written by Dr. Schoenfeld and Dr. Johnson, from that initial filing were lost by the Commissioner. [Motion at p. 5-6.] On the contrary, the Commissioner's decision did note that plaintiff filed disability applications earlier than 1997 and that one of them alleged a disability onset date as early as December 1991; accordingly, any error on this point was harmless. [AR 229.] Moreover, plaintiff shares in the burden of ensuring the adequacy of the record, and it does not appear that he retained a copy of these lost medical records or raised them as an issue when the Commissioner made its latest decision. See 20 C.F.R. §§ 404.935, 404.1512(a)&(c), 404.1516.

In Claims Four and Five, plaintiff argues that substantial evidence does not support the Commissioner's finding of non-disability and cites medical evidence in support of a finding of disability. [Motion at p. 6-11.] However, as the Court found in its decision, the Commissioner's finding was supported by substantial evidence, including the opinions of a treating physician, two examining physicians, and two state agency physicians that plaintiff's functional limitations did not preclude him from performing his past relevant work. [AR 157, 161-62, 172-74, 176-83, 194-95.] Where, as here, there was "relevant evidence which a reasonable person might accept as adequate to support a conclusion," the Commissioner's

decision should be upheld. See Reddick v. Chater, 157 F.3d 715, 720-21 (9th Cir. 1998).

Sixth, plaintiff alleges that vocational testimony taken at the May 2005 hearing was misrepresented in ALJ Schloss' July 2005 decision; plaintiff further alleges that ALJ Schloss failed to make a proper credibility determination. [Motion at p. 12-13.] However, ALJ Schloss' decision was vacated when the Appeals Council assumed jurisdiction and issued its own independent decision regarding plaintiff's functional capacity and the vocational evidence of plaintiff's ability to perform his past relevant work, which is the only subject of the instant complaint.[3] Accordingly, there is no basis to revisit ALJ Schloss' decision.

Seventh, plaintiff contends that the Dictionary of Occupational Titles ("DOT") does not accurately describe plaintiff's past relevant work as it is generally performed in the national economy; plaintiff also contends that the Commissioner ignored his subjective pain testimony. [Motion at p. 13-15] However, despite plaintiff's disagreement, the Ninth Circuit has instructed that the DOT is considered the "best source for how a job is generally performed" in the national economy. Pinto, 249 F.3d at 845. In this case, the Commissioner relied not only on the DOT, but on the testimony of the vocational expert, to reasonably conclude that the jobs of writer and college professor, generally performed at the light exertional level,

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[3]Although the vocational testimony taken at the May 2005 hearing formed the basis of both ALJ Schloss' July 2005 decision and the Appeals Council's February 2006 decision, the Appeals Council explicitly stated that it "did not adopt [ALJ Schloss'] findings or conclusions regarding whether the claimant is disabled" [AR 228] and reached an independent conclusion that plaintiff could return to his past relevant work.

were not precluded by plaintiff's functional capacity. [AR 236-37.] Moreover, the Commissioner did consider plaintiff's subjective pain testimony and cited clear and convincing reasons to discount it. [AR 235-36.]

Eighth, plaintiff contends that the Appeals Council improperly assumed jurisdiction over this case by intercepting a letter that plaintiff's wife had written in August 2005 to a United States congressman about the case and construing it as a request for review of ALJ Schloss' unfavorable July 2005 decision. [Motion at p. 15-17.] However, the Commissioner's regulations authorize the Appeals Council to assume jurisdiction over a case at any time in response to written exceptions to the decision of an administrative law judge. 20 C.F.R. § 404.984(b)(3). The evidence demonstrates that although these objections were not directly addressed to the Appeals Council, plaintiff acquiesced in having them construed as written exceptions pursuant to the regulation: first, plaintiff's wife wrote a letter in February 2006, shortly after the Appeals Council notified the parties that ti was assuming jurisdiction, complaining about ALJ Schloss' decision and stating that the "Appeals Council must honor the promise . . . to consider all these arguments" raised against that decision [AR 224]; second, plaintiff raised no objection to the Appeals Council's jurisdiction when he had an opportunity to do so between the date that the Appeals Council notified the parties of its intent to assume jurisdiction and the date that its decision became final. Under these circumstances, the Appeals Council reasonably construed the August 2005 letter as written exceptions to ALJ Schloss' decision.

Ninth, plaintiff argues that the Appeals Council abused its discretion by unreasonably reversing ALJ Harrell's November 1998

finding that, based on the vocational expert testimony taken in a September 1998 hearing, plaintiff could not perform his past relevant work. [Motion at p. 17-21.] However, it does appear that ALJ Harrell did not fully consider the vocational testimony at the September 1998 hearing: the vocational expert testified at that time that plaintiff could return to his past relevant work as it is typically performed in the national economy, pursuant to the jobs' descriptions in the DOT. [AR 53.] In a subsequent hearing in May 2005, the vocational expert similarly testified that plaintiff could perform his past work as it is generally performed. [AR 444.] Based on this testimony, there was substantial evidence for the Appeals Council to find that plaintiff was not disabled at step four of the sequential evaluation. Accordingly, none of the nine claims raised by plaintiff would have warranted relief from the Court's judgment pursuant to Rule 60(b).[4]

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[4]In his request for oral arguments, plaintiff appears to raise an additional claim of ineffective assistance of counsel. As an example, plaintiff contends that after the Court issued its judgment, counsel delayed returning plaintiff's case file, causing plaintiff to miss the ten-day deadline to file a motion for reconsideration. However, there is no constitutional right to effective assistance of counsel in Social Security proceedings. See generally Nicholson v. Rushen, 767 F.2d 1426, 1427 (9th Cir. 1985). Even if there were, the performance of plaintiff's counsel would not have been unreasonable, as noted above. Moreover, as plaintiff concedes, defendant stipulated to an extension of time for plaintiff to file the motion for reconsideration.

IV. ORDERS

IT IS ORDERED that:

1. Plaintiff's motion for reconsideration is DENIED.

2. The Clerk of the Court shall serve this Order on all parties.

DATED: November 13, 2008

/S/
CARLA M. WOEHRLE
United States Magistrate Judge

SOCIAL SECURITY
SEP 29 2005

The Honorable Jerry Lewis
Member, U.S. House of Representatives
Suite J-5
1150 Brookside Avenue
Redlands, California 92373

Dear Mr. Lewis:

This is in further response to your inquiry on behalf of your constituent, Mr. Richard D. Boyle, who wrote to you about his Social Security Benefits. This letter supplements the information that you recently received from Annie White, Associate Commissioner for the Office of Public Inquiries.

On July 26, 2005, an Administrative Law Judge (ALJ) issued an unfavorable decision with respect to Mr. Boyle's application for benefits. This decision was issued following a district court remand. Mr. Boyle was informed in the Notice of the Decision that he had 30 days to file exceptions with the Appeals council. Since your office was contacted within the 30 day time period for filing exceptions, the Appeals Council will consider the letter that Mr. Boyle sent to Ms. Judy Miller of your office, and Mrs. Boyle's letter of August 2, 2005, as an implied request for review.

Furthermore, the Appeals Council will consider all the arguments that Mr. Boyle raised, and will be issuing a decision a decision soon.

Thank you for contacting us on this matter. Please let me know if I can be of further assistance.

Sincerely,

_____/S/_____

A. Jacy Thurmond
Associate Commissioner

WGA

August 1, 2005

Richard Boyle
P.O. Box 731
Forest Falls, CA 92339

Dear Mr. Boyle:

I am writing in response to your inquiry. You have advised the Guild that in a recent decision dated July 26, 2005 by the Social Security Administration, Administrative Law Judge Joseph Schloss stated that writers are "independent contractors" because they are employed by their agents, and not by production companies.

We have not seen the decision, but as you describe it, it is clearly erroneous. When writers are employed to work in the theatrical and television industry, they work directly for the production companies that hire them. Writers are not employed by their agents. Agents serve solely as intermediaries or representatives to secure that employment. It is the production company, not the agent, which acts as the employer, enters into an employment agreement, and pays wages and benefits to the writer. It is also the production company, not the agent, which prepares the relevant W2 forms and does applicable withholding.

Should you have any other questions or concerns, please let us know.

Sincerely,

_____/S/_____
Marshall M. Goldberg
Deputy Executive Director
and General Counsel

Ms. Judy Miller
District Office
Hon. Jerry Lewis
Member of Congress

Dear Ms. Miller:

I know in the constitution there is the separate powers provision between the legislative and judicial branches, which of course I accept as a good idea, however in my case there seems to be such flagrant violation of the laws as written by congress, that the SSA itself to look to see if it's own policy is being violated by these policies. Besides the judicial issues, there are also four areas I believe congress should investigate.

1. Each year congress approves a large sum of money to hire doctors to examine claimants and testify at hearings. The ALJ in my case totally rejected or ignored the opinions, testimony, reports and findings of the SSA approved doctors in favor of his own medical views. If this is SSA policy, then the money for hiring medical is being wasted.

2. Congress allocates money for the SSA to hire vocational experts. If there opinion is either false, worthless or totally uninformed, as in my case, is that money well spent.

3. A basic right of any citizen is to due process, and in my case the right to representation, and without that, to ask, in writing and before the ALJ, not to proceed on legal issues, such as testimony of vocational and medical

experts, without adequate representation. In my case that was denied. Is that SSA policy?

4. The right to discuss issues such as errors in earnings record with a field office representative is a basic right under the law. However when representatives refused to attend scheduled meetings, refuse to return phone calls, or refuse to discuss the matter, and then make an uninformed decision, is that SSA policy?

I sincerely hope congress addresses these issue. Thank you for your interest.

With Regards,

_____/S/_____

Richard Boyle
PO Box 731
Forest Falls, CA 92339